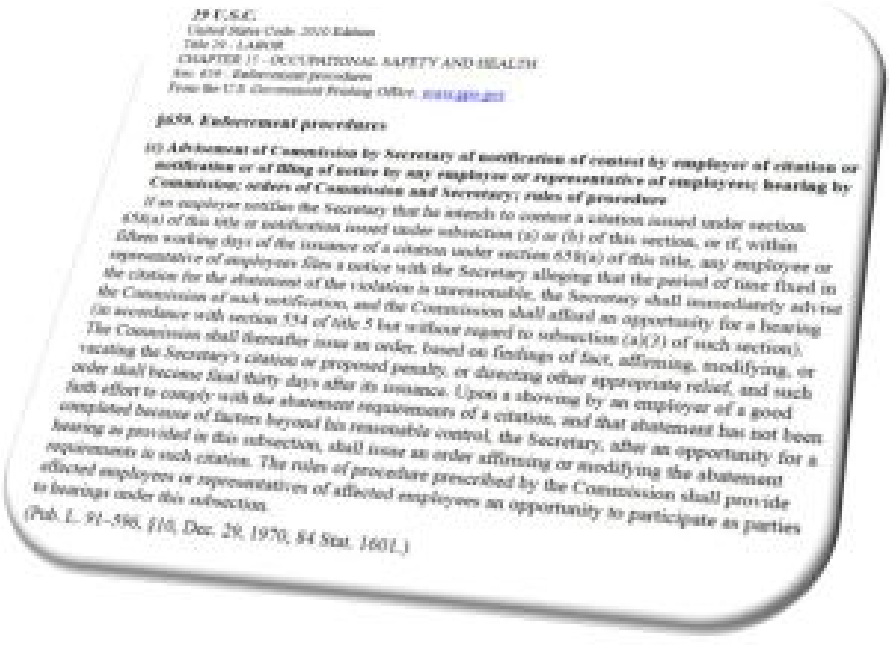
FEBRUARY 22, 2016 | OSHA INSPECTIONS, CITATIONS & ENFORCEMENT

New ALJ Decision Emboldens OSHA to Demand More Corporate-Wide Abatement

By Eric J. Conn and Lindsay A. Smith

Employers with multiple worksites beware – OSHA is now much more likely to demand so-called "enterprise-wide abatement" in Complaints filed with the Occupational Safety and Health Review Commission (the "Review Commission").

Despite what had been settled law for years and the plain language of the OSH Act – that abatement must be limited to the specific workplace where a violative condition was observed by OSHA during an inspection – during the Obama Administration, OSHA began to pursue "enterprise-wide" mandatory abatement; not only as negotiated terms in settlement agreements, but also in relief sought in Complaints filed with the Review Commission. 29 U.S.C. Sec. 659(c) authorizes the Review Commission to:



29 U.S.C.
United States Code, 2010 Edition
Title 29 - LABOR
CHAPTER 15 - OCCUPATIONAL SAFETY AND HEALTH
Sec. 659 - Enforcement procedures
From the U.S. Government Printing Office, www.gpo.gov

§659. Enforcement procedures

(c) Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(2) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

(Pub. L. 91–596, §10, Dec. 29, 1970, 84 Stat. 1601.)

"issue an order ... affirming, modifying or vacating the Secretary's citation or proposed penalty or directing *other appropriate relief* ...."

Relying on the "other appropriate relief" language, OSHA has been requesting the Review Commission to order enterprise-wide abatement based simply on observations of a violation at a single location within a multi-facility company.

The Agency's enterprise-wide abatement efforts first gained notoriety a few years ago during OSHA's relentless enforcement efforts targeting the U.S. Postal Service. In a 2010 enforcement action against USPS, relying on the "other appropriate relief" OSH Act language, OSHA demanded from the Review Commission an order for USPS to abate the alleged hazards that the Agency observed at one USPS station *at all USPS operations around the country*. USPS fiercely contested that demand. The enterprise-wide abatement issue was not decided by the Review Commission in that case, however, because OSHA and USPS reached a landmark settlement obviating the need for the Commission to rule on its authority to grant such relief.

We saw OSHA's efforts to legitimize corporate-wide abatement again in 2012 in a major enforcement action in the grocery store industry. The press release issued with OSHA's citation reported that the Department of Labor was seeking enterprise-wide relief at more than 60 stores in a grocery store chain based on hazards that were observed at only two of the chain's stores. OSHA stated in its Complaint that "upon information and belief," employees at approximately 58 stores (that had not been inspected!) "were exposed or likely to be exposed to" similar hazards. That case too, though, was resolved before the Review Commission could speak to its authority to grant such relief.

As the Agency became more and more emboldened – dare I say brazen – over the second term of the Obama Administration, enterprise-wide abatement has continued to be included in settlements of major enforcement actions and demands in Complaints filed with the Review Commission.

Last month, OSHA finally got the ruling they were hoping for. Well, that's what OSHA will tell you. Here's what really happened.

In a case called *Secretary of Labor v. Central Transport LLC*, OSHA cited the employer for 14 alleged serious, repeat and willful violations of workplace safety standards at one of its shipping terminals in Massachusetts. OSHA proposed $330,800 in civil fines. In its Complaint filed with the Review Commission, OSHA alleged that

Central Transport failed to comply with regulations related to the operation of powered industrial trucks at the worksite inspected, as well as other locations that were not inspected, and requested an Order compelling Central Transport to abate the violations at all of its locations. Central Transport teed up the issue with a motion asking the Review Commission to strike the portion of OSHA's claim, arguing that the OSH Act does not authorize the Review Commission to order enterprise-wide relief. Specifically, Central Transport argued that Section 10(c) of the Act (establishing the Commission's remedy authority), and Review Commission Rule 34, when read in conjunction, preclude an order of enterprise-wide abatement at work sites that were not actually inspected by OSHA. As Central Transport argued in its brief, these provisions limit the Review Commission's authority to "remedy[] specific violations at individual worksites based on findings of fact."

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

CENTRAL TRANSPORT, LLC,

Respondent.

OSHRC DOCKET NOS. 14-1493, 14-1612, 14-1934

ORDER DENYING RESPONDENT'S MOTION TO STRIKE THE SECRETARY'S CLAIM FOR ENTERPRISE-WIDE ABATEMENT OR, IN THE ALTERNATIVE, TO SEVER AND STAY THAT CLAIM

The Secretary's January 26, 2015 Complaint in Central Transport, LLC, case #14-1934 (Billerica, Massachusetts), includes a request for the entry of an order of enterprise-wide abatement against Respondent Central Transport compelling Respondent's compliance with standard 1910.178(p)(1) at all of Respondent's workplaces.[1] See Complaint ¶¶ XV, XVI, XVII, XVIII, XIX, and Relief Requested. Respondent's March 18, 2015 Answer denies many of the factual allegations set forth in the Complaint regarding the enterprise-wide abatement requested and denies that the Occupational Safety and Health Act (the Act) authorizes the use of enterprise-wide abatement and denies that the Occupational Safety and Health Review Commission can grant enterprise-wide relief. See Answer ¶¶ XV, XVI, ...

Judge Carol A. Baumerich, the Administrative Law Judge ("ALJ") at the Review Commission assigned to the *Central Transport* case, ruled that OSHA may proceed with its novel legal claim for enterprise-wide abatement.

In what we believe is a flawed interpretation of section 10(c) of the OSH Act, Judge Baumerich ruled that the phrase "other appropriate relief" should be interpreted broadly, and may include the enterprise-wide abatement action sought by OSHA. In support of her decision, she improperly pointed to several settlement agreements that include terms to which employers *voluntarily* agreed to commit to address hazards at locations beyond those inspected as somehow supporting the contention that the Review Commission has authority to grant enterprise-wide abatement for citations.

True to form – and viewing publicity as a key weapon in its arsenal – OSHA issued a national press release to broadcast the decision, making a case (we believe, flawed) that ALJ Baumerich's ruling on this pre-hearing

motion is legal precedent authorizing enterprise-wide abatement. In the press release, OSHA's Regional Solicitor of Labor for New England, described the decision as:

"significant and *precedent-setting* . . . The department is now authorized to proceed with discovery and to demonstrate, by presenting its evidence at trial, that enterprise-wide abatement is merited on the facts of this case."

In other venues, OSHA has also been touting ALJ Baumerich's ruling as "precedent" for the proposition that the OSH Act gives OSHA the authority to request and the Review Commission the authority to order enterprise-wide abatement. OSHA goes too far in its celebration.

To be clear, however, the Judge did not award enterprise-wide relief to OSHA in this case; she simply permitted the issue to proceed to trial with the rest of the case for a determination whether it is warranted. It is also important to understand what creates legal precedent in the context of OSHA cases. ALJ Baumerich is a hearing-level judge, not one of the three Presidential-appointed Commissioners who hear appeals of OSHA cases. ALJ decisions that have not undergone review have no precedential value in the legal sense. Indeed, ALJ Baumerich's decision is no more of a legal precedent than another ALJ's precisely opposite decision on the same issue from 2013. In *Secretary of Labor v. Delta Elevator Service Corp.*, ALJ William S. Coleman found that:

"while enterprise-wide abatement has occurred in Commission cases where the parties have agreed to such abatement in a voluntary settlement agreement, ... there is no Commission or other precedent holding that such abatement may be directed pursuant to the 'other appropriate relief' clause in section 10(c) of the Act."

These conflicting ALJ decisions, and what appears to be fairly clear language in the OSH Act portend a different outcome for OSHA's enterprise-wide abatement policy when considered by the Commissioners on the Review Commission, whose decisions do constitute legal precedent.

Nevertheless, emboldened by the ruling on the pre-hearing motion in *Central Transport*, employers can count on OSHA, at least over the last year of the Obama administration, making everything it can out of this ruling.